SUPREME COURT, U.S.
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No. 93-389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PATRICK L. SWINDALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

This is a perjury case. It is neither a money-laundering case nor a drug case. Petitioner has never been charged with any substantive crime. Had Petitioner refused to testify before the grand jury, there is no reason to believe that any charges would have been brought against him.[1] All of the charges relate to Petitioner's testimony before a grand jury that was investigating *only* possible violations of the "structuring transactions" provisions contained in Title 31. Gov. Ex. 44T at 3 (Pet. App. III at A-71, 72). Accordingly, Respondent's various references to Title 18 money-laundering violations or investigations are utterly irrelevant to the instant case.

STATEMENT OF THE CASE

Respondent's summary of the indictment, set forth in its Statement of the Case, misstates both the substance and content of each count presently before the court:

In summarizing Count 2, Respondent represents that "petitioner testified that he was unaware that Mullaney's investors had insisted on keeping their identities secret." (Reply at 5). In actuality, the prosecutor asked Petitioner, "Was there a statement concerning how well the money had been insulated from Mike's sources so that it could not be traced from the source to Mike, through LeChas-

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[1]At Petitioner's Sentencing Hearing, the trial judge stated that "*there was no evidence* that Mr. Swindall had knowledge of the conspiracy to launder money to which Mr. LeChasney pled guilty. . . . Nor has the government proved that the crime of structuring a financial transaction to evade reporting laws actually occurred, that Mr. Swindall knew about it, and that he perjured himself." R. 39-12, 14 (emphasis added). (App. at A-5).

ney to you?" Petitioner responded, "No. I don't recall that." Count 2 (App. at A-1).

In summarizing Count 3, Respondent represents that Petitioner lied to the grand jury when he said that "he had walked away from the proposed transaction . . . at the Greenbriar." (Reply at 6). Respondent fails to mention the fact that Petitioner qualified his statement by telling the grand jury that "there is no doubt that *after that, after Greenbriar*, I was back into it." Gov. Ex. 44T at 97 (emphasis added) (App. at A-1).

In summarizing Count 5, Respondent represents that Petitioner told the grand jury that "Mullaney had not admitted at the Greenbriar that the cash included drug-sale proceeds." (Reply at 6) In fact, the actual question contained in Count 5 was a compound one, "Mr. Swindall, were you informed by Mike during that meeting in Greenbriar *that he violated the laws of the United States* and that it was *his feeling* that this money was narcotics dollars?" Count 5 (emphasis added). (App. at A-2). At trial, Mullaney acknowledged that he never told Petitioner that he "violated the laws of the United States." R. 25-41 (Pet. App. III at A-74).

In summarizing Count 6, Respondent represents that Petitioner told the grand jury that "he repeatedly had insisted that the cash not be delivered in his presence." (Reply at 6). A careful reading of Count 6 shows that, in context, the question was specifically limited to the period *after the September 13th meeting at the Greenbriar*. At trial, Mullaney testified that *the only time* petitioner agreed to accept money from Mullaney was during a conversation that took place on September 10, 1987, three days *before* the meeting at the Greenbriar. R. 25-54 (App. at A-4).

In summarizing Count 7, Respondent represents that Petitioner told the grand jury that "the $150,000 check that petitioner received was not connected to the transaction with Mullaney." (Reply at 6). In actuality, Petitioner never denied a connection between the $150,000 check and the transaction with Mullaney. Immediately after the statement quoted in Count 7, Petitioner stated that Mullaney's money would have been used to reimburse LeChasney the $150,000 that he advanced, *if* Petitioner and Mullaney subsequently reached an agreement on the details of the transaction they had discussed. Gov. Ex. 44T at 109 (Pet. App. III at A-72, 73).

In summarizing Count 8, Respondent represents that Petitioner told the grand jury "that he did not give the $150,000 check to his contractor." (Reply at 6). In actuality, Petitioner was never asked to whom he gave the $150,000 check. Petitioner's alleged perjurious statement about his having given the check to his secretary was made as an *incidental* part of Petitioner's overall account of how he returned LeChasney's attorney's $150,000 check on September 25, 1988. Count 8. (App. at A-2, 3). It is undisputed that Petitioner's secretary was the person who actually returned the check on September 28th. R. 28-156, 157 (App. at A-3, 4).

Respondent represents that "[b]ecause of petitioner's contention that he had not been aware of the federal restrictions on money laundering, the government introduced at trial the reports of the House Judiciary Committee on 1986 money-laundering legislation [Title 18]." (Reply at 7). *Respondent's representation in this regard is patently false. Petitioner has never* denied knowledge of Title 18 money-laundering legislation considered by the House Judiciary Committee on which he sat. Significantly,

before the grand jury, Petitioner was never once asked about any Title 18 money-laundering legislation considered by the House Judiciary Committee. The only legislation about which Petitioner was questioned during his grand jury appearance was Title 31 legislation that was considered *only by the Banking Committee*.

ARGUMENT

I. THIS COURT HAS NEVER SQUARELY ADDRESSED THE INFECTION ISSUE AS IT RELATES TO A SPEECH OR DEBATE VIOLATION BEFORE THE GRAND JURY.

Respondent argues that "a Speech or Debate violation before a grand jury does not require dismissal of charges unrelated to the defendant's status or actions as a member of Congress," relying on *United States. v Johnson*, 383 U.S. 169 (1966). Reply at 11. Respondent's argument in this regard fails for three reasons.

First, in *Johnson*, this Court never squarely addressed the issue whether a Speech or Debate violation *during a grand jury proceeding* requires dismissal of counts unrelated to a defendant's status as a member of Congress. *See Helstoski II*, 635 F.2d at 204. In *Johnson*, this Court limited its consideration to the effect of a violation that occurs during the trial of a case. In this case, the violation occurred during the trial of the case *and during the presentation of the case to the grand jury*. It is significant, however, that, in *Johnson*, this Court remedied the problem presented by the prosecutor's Speech or Debate violation during the trial of the case by requiring a new trial "wholly purged of elements offensive to the Speech or Debate Clause." 383 U.S. at 185. Implicit in such a requirement is the result that, when the violation occurs before the grand jury, and cannot, therefore, be wholly purged, as is the case presently, the

case must be dismissed.

Second, because in *Johnson* this Court and the Fourth Circuit were addressing a case where the Speech or Debate violation occurred during the trial, neither this Court nor the appeals court ever went behind the face of the indictment. In fact, as was noted by the Third Circuit in *Helstoski II*, "we do not know whether transcripts of the grand jury were available in *Johnson* and *Brewster*." 635 F.2d at 205.

Third, if Respondent is implying that the decisions of this Court and the Fourth Circuit in *Johnson* can be applied to a situation where the violation occurred before a grand jury, Respondent fails to explain how this case can be retried and, at the same time, meet this Court's requirement that the case be *wholly* purged of such elements. When the Third Circuit was confronted with this dilemma, it concluded that the Speech or Debate privilege was too important to ignore or dilute.

Respondent asserts that "no case supports petitioner's automatic dismissal rule." Reply at 13. Respondent's assertion is incorrect. The Third Circuit's decision *Helstoski II*, 635 F.2d at 205, unequivocally supports Petitioner's contention that, where a violation occurs before a grand jury, and cannot, therefore, be wholly purged of Speech or Debate violations, the case must be dismissed.

II. A CLEAR CONFLICT EXISTS BETWEEN THE CIRCUITS WITH RESPECT TO THE INFECTION ISSUE.

Notwithstanding Respondent's assertions to the contrary, the Eleventh Circuit's decision, particularly with respect to the infection issue in this case, is in irreconcilable conflict with the

decisions of the Third Circuit in *Helstoski II*, 635 F.2d 200, and of the Fourth Circuit in *United States v. Johnson*, 337 F.2d 180 (4th Cir. 1964). Assuming arguendo that this Court determines that Respondent is correct in its assertion that a Speech or Debate violation before the grand jury does not necessitate the quashing of an indictment in its entirety, the conflict between the circuits regarding the infection issue must still be resolved.

This is true because, in the instant case, the Eleventh Circuit specifically determined that the prosecutor's introduction of Speech or Debate material infected the grand jury's consideration of Petitioner's "knowledge or recollection of other matters".

> The impressions formed by the grand jury that Swindall was lying were based in part on the AUSA's questioning of the congressman about Speech or Debate matters. The grand jury observed Swindall respond to questions about his committee memberships, *and then judged the truthfulness of his statements disclaiming knowledge or recollection of other matters.*

971 F.2d at 1549. Petitioner's "knowledge or recollection of other matters" was the central issue of fact in the grand jury's consideration of Petitioner's innocence or guilt with respect to each and every count of the government's perjury indictment.[2]

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[2]As a matter of law, none of Petitioner's statements to the grand jury can be perjurious unless the statements were material to the grand jury's investigation. Inasmuch as the grand jury was focused exclusively on possible violations of the "structuring provisions" of Title 31 when Petitioner testified, Petitioner's knowledge of the filing requirements of the "structuring transactions" provisions of Title 31 were necessarily material to each and every count of the indictment in this case. In this regard, the Eleventh Circuit has held that "the prosecution need not prove the defendant was aware of the illegality of money structuring in order to convict the defendant of that offense under 31 U.S.C. Section 5324(3). The government need only prove that the defendant was aware of the bank reporting requirement for currency

Despite its determination that the Speech or Debate material infected the grand jury's consideration of Petitioner's guilt or innocence on "other matters", the Eleventh Circuit dismissed *only* those counts of the indictment that it deemed to be *wholly dependent* on the introduction of Speech or Debate material. The Eleventh Circuit's decision to apply a different infection test than the Third and Fourth Circuits have applied in cases that are factually indistinguishable resulted in its sustaining Petitioner's conviction on counts that were necessarily infected by the prosecutor's introduction of Speech or Debate material. The Eleventh Circuit's decision not to dismiss the other perjury counts in Petitioner's indictment, even though the court specifically determined that the prosecutor's introduction of Speech or Debate material obviously infected the grand jury's consideration of Petitioner's truthfulness regarding his "knowledge or recollection of other matters", directly conflicts with the Fourth Circuit's decision in *Johnson* and the Third Circuit's decision in *Helstoski II*.

In *Johnson*, the Fourth Circuit dismissed the *entire* indictment, even though "the evidence [was] sufficient to support

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transactions in excess of $10,000 and sought to evade those requirements through money structuring." United States v. Brown, 954 F.2d 1563, 1568 (11th Cir. 1992). Thus, when the prosecutor asked Petitioner about his knowledge of the filing requirements of Title 31, it served the dual purpose of proving Petitioner's knowledge of illegality (an essential element of proof in Counts 1, 9, and 10 of the perjury indictment in the instant case) and Petitioner's awareness of the filing requirements of Title 31 (an essential element of materiality with respect to each and every count of the perjury indictment). It was the Eleventh's Circuit's failure to recognize the prosecutor's second purpose for questioning Petitioner about the Title 31 portion of the Omnibus Drug Act of 1986 that resulted in its failure to dismiss Counts 2, 3, 5, 6, 7 and 8 of the indictment in this case.

indictment, even though "the evidence [was] sufficient to support a guilty verdict on all counts [of the indictment]", because the court held that the introduction of speech or debate evidence "*infected the jury's consideration of [the defendant's] innocence or guilt under [the other counts]*." (Emphasis added) *Id.* at 204. In *Helstoski II*, the Third Circuit dismissed the entire indictment against Helstoski, even though "some counts [of the indictment] could be tried without reference to speech or debate matters". 635 F.2d at 203.

III. RESPONDENT MISSTATES THE THIRD CIRCUIT'S HOLDING IN HELSTOSKI II.

Respondent attempts to minimize the conflict between the Third Circuit's decision in *Helstoski II* and the Eleventh Circuit's decision in this case by arguing that, in *Helstoski II*, the Third Circuit "made clear, however, that its decision was limited to 'the circumstances of this case' and that it was not announcing a prophylactic rule requiring wholesale dismissal in every case." (Reply at 13). Respondent's deletion of the word "particularly" from its quote of the court's decision in *Helstoski II* yields this gross misinterpretation.

When the word "particularly" is reinserted, it is clear that the court was not limiting its holding to "the circumstances of this case." Instead, the court was limiting its holding to cases, like the instant case, where the Speech or Debate violation cannot be excised *because it occurred during the grand jury proceedings*:

> *Particularly* in the circumstances of this case, *where the infection cannot be excised*, we are unwilling to adopt an interpretation limiting a right the Court has told us is so vital that it must be treated with sensitivity.

Helstoski II, 635 F.2d at 205.

IV. HARMLESS ERROR ANALYSIS DOES NOT APPLY TO SPEECH OR DEBATE CLAUSE VIOLATIONS.

In its Reply brief, Respondent revives, and slightly modifies, the harmless-error argument that was rejected by the Third Circuit in *United States v. Helstoski*, 635 F.2d 200 (3d Cir. 1980) (*Helstoski II*). The Third Circuit rejected the government's contention that a harmless error standard should apply where a violation of the Speech or Debate Clause occurs. In rejecting the government's harmless error argument, the court recognized that "[t]he [Speech or Debate] privilege is not one of nondisclosure but of nonevidentiary use. *In re Grand Jury (Cianfrani)*, [563 F.2d 577, 584 (3d Cir. 1977)]." 635 F.2d at 203.

Respondent cites *United States v. Carney*, 665 F.2d 1064, 1065 (D.C. Cir.), *cert. denied*, 454 U.S. 1081 (1981), and *Arizona v. Fulminante*, 111 S.Ct. 1246, 1263-1266 (1991), as authority for its contention that a Speech or Debate violation bars prosecution *only* on counts tainted by the violation. But even the Eleventh Circuit recognized that this case and *Carney* are different. In its opinion in this case, the Eleventh Circuit recognized the general rule set forth in *U.S. v. Carney*, but noted that "[a] court will not consider evidence received by the grand jury, however, when what transpired before the grand jury itself violates a constitutional privilege." *See* [*United States v. Calandra*, 414 U.S. 338, 346 (1974)]; *Helstoski II*, 635 F.2d at 203." *United States v. Swindall*, 971 F.2d 1531, 1547 (11th Cir. 1992). The Eleventh Circuit determined that the prosecutor's violation of Petitioner's Speech or Debate privilege tainted the jury's opinion of Petitioner's truthfulness, one of the elements

that is common to each and every count of the perjury indictment in this case. 971 F.2d at 1549.

The Third Circuit thoroughly analyzed this Court's decisions in *Brewster* and *Johnson* and concluded that a harmless-error analysis was inappropriate because "the protection is far broader than a simple prohibition against an offer to prove a legislative act. '[The clause] provides that Members shall not be questioned in any other Place.' *United States v. Helstoski*, [442 U.S. 477, 489 (1979)]." 635 F.2d at 204. *Helstoski II* is factually indistinguishable from this case, and the same result should follow here.

V. REP. FRANK'S TESTIMONY WAS RELEVANT TO EACH AND EVERY COUNT OF THE INDICTMENT.

Respondent argues that Congressman Frank's testimony "related solely to the issue of petitioner's knowledge of federal money-laundering statutes" and was "not relevant to the remaining counts for the same reason that the evidence introduced in violation of the Speech or Debate Clause was not relevant to those counts." (Reply at 16). Respondent ignores the fact that Petitioner's knowledge of the filing requirements contained in the "structuring transactions" provisions of Title 31 was material to each and every count of the indictment because the grand jury investigation at the time of Petitioner's appearance was exclusively focused on the "structuring transactions" provisions of Title 31. *See supra* n. 2. Accordingly, Respondent's argument in this regard is without merit.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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APPENDIX (EXCERPTS OF RECORD)

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[Gov. Ex. 44T] PETITIONER'S GRAND JURY TESTIMONY A-1

[R. 2] INDICTMENT A-1

[R. 28-156, 157] SECRETARY'S TRIAL TESTIMONY A-3

[R. 25-54] MULLANEY'S TRIAL TESTIMONY A-4

[R. 39-10, 12-14] TRIAL JUDGE STATEMENT AT SENTENCING A-4

APPENDIX (EXCERPTS OF RECORD)

[GOVT. EX. 44T] PETITIONER'S GRAND JURY TESTIMONY

[97] A. Craig, there is no doubt that after -- that after Greenbriar I was back into it. And I stayed back into it, in the sense that all along I tell you I was trying to rationalize, figure out a way that this thing could be legitimate in a technical sense, and I never could achieve that end. In my mind, it could never be legitimate. And that's why I withdrew.

[R. 2] INDICTMENT

COUNT 2

Q. Do you recall engaging in a conversation about how well Mike's sources have covered their end of the deal, in terms of the money being traced?

A. *No.* I'm not even sure I understand that question. I don't recall it.

Q. Was there a statement concerning how well the money had been insulated from Mike's sources so that it could not be traced from the source to Mike, through LeChasney, to you?

A. *No. I don't recall that.*

COUNT 3

A. . . . And then I looked at him eyeball-to eyeball, and this was at the Greenbriar, and I said, Mike, would you do this, if you were me? And he said, no; I wouldn't. And I said, I don't

think I want to do it either. *And I walked away from it, basically* – I felt good about it because I really felt like what he was saying was, you don't have to worry about this; the deal won't be done, and you don't have to worry about it.

COUNT 5

Q. Mr. Swindall, were you informed by Mike during that meeting in Greenbriar that he violated the laws of the Unites States and that it was his feeling that this money was narcotics dollars?

A. *I don't recall any conversation like that.* The only conversation that I recall with Mike about that was when I asked him, would you do this, Mike? And I asked him, is this drug money? And he said he couldn't tell me it wasn't. But, no. I don't remember any tech – Craig, the reason I don't think that happened is folks don't talk technically like that. If he had of started talking technically, I think I would have remembered it because those are very technical terms of art that you're talking about.

COUNT 6

Q. And what I'm saying is, following that conversation, did you continue to negotiate how the deal would be transpired by using Charles LeChasney as your buffer in this transaction?

A. *I continuously said, I will not take money from you directly.* If that is the same -- I don't remember saying, Charles –

COUNT 8

A. Also, the last sentence in paragraph twenty-eight, Swindall said he may have been the one to actually return the check

after returning to Atlanta. I wouldn't have said that because I didn't return to Atlanta. I called by secretary, during that week-end. It was probably Saturday, September 26th. And it was Sandra, who is Merline's daughter, that I told that to. Both work for me. And mentioned to her to have the check returned, and *I had given the check to Merline on Friday and told her to hold it until Monday morning, and I would give her instructions as to whether or not she should deposit it.* Okay. And I've already covered the one about the twenty-nine -- of at least a thousand dollars.

[R. 28-156, 157] SECRETARY'S TRIAL TESTIMONY

[156] Q. Now, later on did there come a time when you received something, a check from another person?

A. Yes.

Q. And who did you get that check from?

[157] A. I remember it now to be John Sauers.

Q. And what was that check–Do you remember who it was made out to?

A. It was made out to Pat.

Q. And how much was it for?

A. $150,000.

Q. Was the check endorsed?

A. I believe it to be, yes.

Q. And why do you believe it to be? Can you tell us a little bit about that?

A. Well, first I can visualize it, looking at it and seeing that it was endorsed, and most of all because on the day that I returned it Pat called after I had returned it and said did you

void the check before you returned it. And I said no, which put me into a panic thinking that I had not done this and he had endorsed the check.

Q. Did you personally take the check somewhere else or did someone come and get it?

A. Someone came to get it.

Q. Do you know how came and got it?

A. I cannot remember. I know that I called Douglas Daum. I do not remember whether he came to pick it up or a courier picked it up, but I did not take it anywhere.

[R. 25-54] MULLANEY'S TRIAL TESTIMONY

Q. Now, in terms of what you testified earlier to about Mr. Swindall agreeing to accept the money, this was the conversation on September the 10th before you went for your walk at the Greenbriar, correct?

A. Yes, Sir.

Q. That was the only time that Mr. Swindall agreed to accept cash from you?

A. Yes, Sir. The other time at the Greenbriar it was left open when we left the Greenbriar.

Q. There was never an agreement at the Greenbriar, was there?

A. No, Sir at the Greenbriar it was left open that he was going to sleep on it.

[R. 39-10, 12-14] TRIAL JUDGE STATEMENT AT SENTENCING

[10] The government claims, but has completely failed to prove, that Mr. Swindall's testimony before the grand jury was in respect to the crime of money laundering. There is no evidence that the crime of money laundering was committed in connection with the negotiations among Mr. Swindall, Mr. LaChasney and Mr. Mullaney at the Marriott Marquis in Atlanta, the Greenbriar, or anywhere else.

. . .

[12-14] There was no evidence that Mr. Swindall had knowledge of the conspiracy to launder money to which Mr. LeChasney pled guilty. . . .

Nor has the government proved that the crime of structuring a financial transaction to evade reporting laws actually occurred, that Mr. Swindall knew about it, and that her perjured himself.